LS 0-9267
1954

OGC Has Reviewed

6 September 1955

MEMORANDUM FOR THE RECORD

SUBJECT: Disclosure of Medical Records and the Physician-Patient Privilege

1. This memorandum considers the law surrounding privileged communications between physician and patient and its application to the question of disclosing CIA medical records to proper administrative authorities. An earlier study by this Office is embodied in a memorandum of 20 August 1954 (LS-9267), which examines the problem generally; a similar general treatment will be found in 58 Am. Jur. §§ 401 et seq. This paper does not purport to be a general survey but is, rather, focused upon the particular problem at issue.

2. Communications between physician and patient were not privileged at common law. Following the passage of a statute in New York in 1828 privileging such communications, similar statutes were introduced elsewhere and are now in effect in about half the states (77 ALR 679; 25 ALR 2d 1429). In the absence of such a statute, physician-patient communications are not privileged.

3. Although the exact terms of the statutes vary in different jurisdictions, and one must examine the applicable statute and the local decisions in evaluating the admissibility of particular testimony or records in a particular case, the local rule, whatever its details, will be a rule of evidence. The statutes are applicable when, in court, it is sought to introduce the testimony of a physician concerning information he has obtained in the course of a physician-patient relationship. If, at this point, the patient objects to the introduction of this testimony, and if the case falls within an applicable statute, the court must (in some jurisdictions, may) refuse to permit the testimony.

4. A survey of those jurisdictions of immediate interest to this Agency reveals that there is no privilege under the statutes of Virginia or Maryland, nor is one embodied in the Federal Rules of civil or criminal procedure. A privilege is created by the District of Columbia Code, Section 14-308, which, since it appears typical of such statutes, is quoted here in its entirety.

"Testimony of physicians--Inapplicable in criminal cases.

In the courts of the District of Columbia no physician or surgeon shall be permitted, without the consent of the person afflicted, or of his legal representative, to disclose any information, confidential in its nature, which he shall have acquired in attending a patient in a professional capacity and which was necessary to enable him to act in that capacity, whether such information shall have been obtained from the patient or from his family or from the person or persons in charge of him: PROVIDED, That this section shall not apply to evidence in criminal cases where the accused is charged with causing the death of, or inflicting injuries upon a human being, and the disclosure shall be required in the interests of public justice."

5. Even if the privilege exists in the jurisdiction, it is the privilege only of the patient, not of the physician, and the patient may waive his privilege, expressly or impliedly, in advance or at the time the question arises. The extent of the privilege is determined by the applicable statute and is further limited by two court-imposed restrictions generally recognized. First, the relationship to which the privilege applies must be one of contract, express or implied. Second, and as an apparent outgrowth of the first rule, no privilege attaches where a physician is consulted for the purpose of examination only and not for treatment, as where a person is examined solely to determine his physical ability to work.

6. For malicious disclosures, the patient has sometimes been permitted to maintain a suit for damages, in an action described by one court as "analogous to slander, except the truth is no defense". No such action is permitted when the disclosure by the physician has been in compliance with statute (for example, one requiring the reporting of certain information to public health authorities) or by order of a court (when the court denies the application of privilege sought to be invoked). Such an action has nothing to do with privilege statutes.

7. I have found no case in which suit has been brought against the physician because of his disclosure of medical information to the mutual employer of physician and patient. I believe that the absence of such cases indicates the general recognition by the courts and the legal profession that in such a situation no action for damages will lie.

8. When the Federal Government, rather than a private company, is the employer, the possibility of an action for damages being brought

is even less. The Government may not be sued without its consent. In giving consent to certain types of tort actions against the Government in the Federal Tort Claims Act, the Congress specifically excepted slander and libel actions. Consultation with the General Counsel's Office of the Veterans Administration, which is concerned not only with the medical records of employees, but also those of claimant-veterans, reveals that neither the Veterans Administration nor any of its physicians, either full-time or contract employees, has ever been the defendant in a civil action arising from the disclosure of medical records or information. Although the Veterans Administration has a complex system of regulations concerning the disclosure of medical records, I was advised by their Associate General Counsel that they would have no hesitancy in revealing this information to any person whatsoever if they felt that the interest of the public or the patient might be served thereby.

9. In summary, a physician is privileged to withhold information obtained from the patient only in the courtroom, and then only if a statute exists authorizing or requiring such withholding, if the patient does not waive the statute, if the information withheld falls under the statute, and if the court does not direct disclosure. Outside the courtroom the physician, like other persons, is subject to slander or libel suits for malicious disclosure of information received confidentially in the course of treating a patient, just as he would be subject to similar action for malicious relaying of information he had obtained outside of his professional duties. Because of his calling he is subject to ethical considerations which do not bind the average layman, as a result of which the public at large, and perhaps the courts, might hold him to higher standards of conduct. Discussion of information from or about the patient in the course of his duties, however, as in consultation with a fellow physician, is not precluded by any rule of law or ethics.

10. Chapter II, Section 1 of the Principles of Medical Ethics of the American Medical Association, indicates a recognition that law or common sense often require disclosure of medical records. The question of propriety, as well as ethics, would seem to preclude a physician from disclosing detailed clinical information to persons whose only benefit therefrom would be a vicarious satisfaction. In the case in point, however, where the issue is one of disclosing medical records obtained by CIA doctors in the course of CIA business, concerning CIA employees, to CIA administrative officers who have been properly designated by the Director to make certain determinations for which this information is necessary, such disclosure would seem to violate no principle of propriety or ethics. Clearly, it violates no principle of law.

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Office of General Counsel